disregard of "well established standards for imposing punitive damages and the statutory requirements of CUTPA"). The court concluded that Petitioner failed to show a "clearly applicable legal principle limiting the amount of punitive damages that can be awarded in a consensual arbitration." *Id.* at 74a. The court reasoned that, even had Petitioner established such a rule, Petitioner failed to show the arbitrators knew of the rule and intentionally ignored it, as is required to establish grounds for vacating an arbitration award under the manifest disregard standard of state law. Conn. Gen. Stat. §52-418(a)(4); Pet. App. 73a-76a.[2]

3. Petitioner appealed to the Connecticut Appellate Court, and the case was transferred to the Connecticut Supreme Court. Pet. App. 56a. Petitioner abandoned the claims it had made to the superior court that the arbitration award was not supported by a finding of reckless or wanton misconduct, and that it was made in manifest disregard of the law. *Compare* Pet. App. 2a *with id. at* 58a-59a. On appeal, Petitioner purported to attack not the award itself, but the superior court's confirmation of the award, on the ground that the confirmation violated a Fourteenth Amendment prohibition against excessive punitive damages, and violated a state public policy against excessive punitive damages. *Id.* at 2a.

This recasting of the claim notwithstanding, Petitioner did not challenge how or on what authority the superior court confirmed the arbitration award. *See id.*; Brief of Defendant-Appellant at ii, *MedValUSA v. MemberWorks,* 872 A.2d 423 (MemberWorks Conn. S. Ct. Br.).

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[2] The court added that as Petitioner's challenge was to the *amount* of punitive damages awarded, and not any legal principle underlying the arbitrators' authority to award punitive damages, the claim did not raise a substantive legal issue of the kind that might constitute a manifest disregard claim. Pet. App. 76a-77a.

Instead, just as it had done in the lower court, Petitioner attacked the amount of punitive damages awarded by the arbitrators as unlawfully excessive. *See id.* The Connecticut Supreme Court considered the case en banc, Pet. App. 1a-55a, and unanimously agreed that confirmation by the superior court did not convert the private arbitration award into an act of the state subject to the Fourteenth Amendment. *Id.* at 7a, 36a. The court also held that Connecticut does not have a well defined public policy against the award of excessive punitive damages, with two members of the court dissenting on that state law ground. *Id.* at 7a, 36a-55a.

The supreme court took care to note that while the amount of a private arbitration award is not open to challenge on Fourteenth Amendment grounds, that "does not mean, and we do not decide, that any arbitral award of punitive damages, no matter how grossly excessive, is insulated from judicial review. We can conceive that there may be such a grossly excessive award that the court would be justified in vacating it on the basis of the arbitrators' evident partiality; *see* General Statutes §52-418(a)(2); or manifest disregard of the law. *The defendant does not claim on appeal, however, that this award fits either of those criteria.*" Pet. App. 31a, n. 15 (emphasis altered).

The supreme court affirmed the superior court's judgment on the parties' motions to vacate and confirm. Pet. App. 36a. This Petition followed.

SUMMARY OF ARGUMENT

Courts, including those whose decisions are cited by Petitioner, agree that arbitration awards of punitive damages are not immune to judicial review, contrary to Petitioner's claim. Such awards are subject to judicial review under well established standards of state and federal arbitration law.

The Connecticut Supreme Court correctly found that Petitioner did not raise on appeal any claim for review under the state arbitration statute. It also correctly rejected Petitioner's claim that, by virtue of the award's confirmation pursuant to state statute, Petitioner was entitled to federal constitutional due process review of the amount of punitive damages awarded by the private arbitrators.

Petitioner's theory would subject this and other private arbitration awards to numerous constitutional challenges, and undermine a central purpose of federal and state law favoring arbitration, to allow private parties to agree to avoid protracted litigation.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is Neither Conflict Nor Confusion In The Courts Regarding Judicial Review Of Arbitration Awards, Including Awards Of Punitive Damages

A. The Courts Agree That Judicial Review Of Arbitration Awards Of Punitive Damages Is Available Under Well Established Statutory Review

1. The cases cited by Petitioner do not conflict with the Connecticut Supreme Court's opinion in this case or with each other. The Connecticut Supreme Court agrees with other federal and state courts around the country that arbitration awards of punitive damages are not immune to judicial review for excessiveness. *See* Pet. 7, 14. Such awards are subject to judicial scrutiny under well established, widely applied standards of arbitration law:

> [Our decision] does not mean, and we do not decide, that any arbitral award of punitive damages, no matter how grossly excessive, is insulated from judicial review. We can conceive that

> there may be such a grossly excessive award that the court would be justified in vacating it on the basis of the arbitrators' evident partiality . . . or manifest disregard of the law.

Pet. App. 31a, n. 15. The test for manifest disregard "consists of . . . three elements, all of which must be satisfied in order for a court to vacate an arbitral award on [this] ground." *Indus. Risk Insurers v. Hartford Steam Boiler Inspection & Ins. Co.*, 868 A.2d 47, 52 (Conn. 2005) (citations and internal quotations omitted). Those grounds are that: "(1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator; (2) the arbitration panel appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit and clearly applicable." *Id.*; *accord Harty v. Cantor Fitzgerald*, SC 17201, 2005 WL 1995354 (Conn. August 16, 2005).

The well established, widely applied ground of review for manifest disregard is the very standard of review on which the Alabama Supreme Court based its decision in *Birmingham News Co. v. Horn*, 901 So. 2d 27 (Ala. 2004), on which Petitioner attempts to rely to show a conflict. In *Horn*, the Alabama Supreme Court undertook its review of an arbitration award of punitive damages "under the manifest-disregard-of-the-law standard," and explicitly "*declin[ed] to undertake any review*" *under a less focused* "'*arbitrary and irrational' standard*." 901 So. 2d at 67, 68 (emphasis added). The Alabama court applied due process considerations only "to the extent" that the party had "properly invoked review of those principles *under its assertion that in making the awards the arbitrators acted in manifest disregard of the law*." *Id.* at 66-67 (emphasis added). The court's "clearly focused" review considered whether the arbitrators manifestly disregarded the due process principles set forth in *Gore*, 517 U.S. 559, and *not*

whether the arbitrators "misunderstood or misapplied those legal principles." Horn, 901 So. 2d at 69 (emphasis added).

In short, the Alabama Supreme Court in *Horn*, like the Connecticut Supreme Court here, abjured federal constitutional due process review of a private arbitration award for excessiveness, and restricted review to the well established standard of manifest disregard. The case on which Petitioner relies as its main authority in seeking *certiorari* neither demonstrates a conflict warranting review, nor supports Petitioner's claim for federal constitutional review of the amount of punitive damages awarded by the arbitrators.

The Connecticut and Alabama decisions are consistent not only with each other, but also with other opinions in which courts have considered claims of excessive punitive damages under existing standards for reviewing arbitration awards. *See, e.g., Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004) (arbitration award not excessive in manifest disregard of *Gore* principles because record did not show relevant cases were cited by appellant and rejected by arbitrator), *cert. denied sub nom EMC Mortgage Corp. v. Stark*, 125 S. Ct. 1973 (2005); *Sanders v. Gardner*, 7 F. Supp. 2d 151 (E.D.N.Y. 1998) (court's application of manifest disregard standard to arbitration award included consideration of *Gore* principles); *Park v. First Union Brokerage Services, Inc.*, 926 F. Supp. 1085, 1090 (M.D. Fla. 1996) (court applied arbitrary and capricious standard of reviewing arbitration award to allegedly excessive award, citing *Gore*); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003) (arbitration award was excessive in manifest disregard of *Gore* principles where record showed arbitrators were advised of and failed to apply the law).

Sawtelle is particularly noteworthy because, like this case, it involved a claim that excessive punitive damages were awarded under CUTPA in a consensual, contractual

arbitration. 754 N.Y.S.2d at 268-69. The *Sawtelle* court applied well established standards of review set forth in the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, to remand an arbitration award to the panel with further judicial guidance on the parameters for awarding punitive damages. *Sawtelle*, 754 N.Y.S.2d at 274.

Despite the Connecticut Supreme Court's explicit declaration that a claim of a grossly excessive arbitration award is subject to judicial scrutiny under established statutory bases of review, Pet. App. 31a, n. 15, Petitioner claims that no such review is available because "the only established law in Connecticut on this point – this case – holds that excessive punitive damages awards are *permitted*, not precluded." Pet. 16, n. 9 (emphasis in original). The Connecticut Supreme Court did not so hold. The court rejected Petitioner's claims that arbitration awards of punitive damages are subject to judicial review for excessiveness on federal due process grounds, and that this award violated a state public policy against excessive punitive damages. But the court also recognized available grounds for review, grounds which are used without conflict or confusion in state and federal courts all over the country. *See* discussion *supra*. The Connecticut Supreme Court did not apply such standards, however, because Petitioner did "not claim on appeal . . . that this award fits either of [the potentially applicable] criteria." Pet. App. 31a, n. 15. Although Petitioner had claimed in superior court "that the excessiveness of the award evidences a manifest disregard or an egregious or patently irrational application of the law," *id.* at 58a-59a, Petitioner abandoned the claim on appeal. *Id.* at 31a, n. 15.

2. *Horn* also fails to support Petitioner's other claim of purported conflict and confusion. Petitioner urges that in *Horn*, the Alabama Supreme Court "declined to follow" the Court of Appeals for the Eleventh Circuit's decision in *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995), which held (like the state court here) that "'the

mere confirmation of a private arbitration award by a . . . court is insufficient state action to trigger the application of the Due Process Clause.'" Pet. 11 (*quoting Davis*, 59 F.3d at 1192).

But *Horn* did not decline to follow *Davis*. Rather, it found *Davis* "readily distinguishable" because, as in this case, "there was no court involvement until after the award was made." *Horn*, 901 So. 2d at 66; *see Davis*, 59 F.3d at 1193 ("we find it significant that [appellant] was a voluntary participant in the arbitration procedure"). Unlike in *Davis* and this case, the lower court in *Horn* had not merely confirmed an arbitration award; it had ordered the parties to arbitrate, so that "but for the court action, there would have been no arbitration at all." *Horn*, 901 So. 2d at 66. In *Horn*, the confirmed award from a court ordered arbitration "justified" the application of due process principles, albeit "only to the extent that [appellant] has properly invoked review of those principles under its assertion that in making the awards the arbitrators acted in manifest disregard of the law." *Id*. *Horn* is not "directly at odds with Connecticut and the Eleventh Circuit," as Petitioner claims. Pet. 12, n. 5.[3]

3. Petitioner also seeks review based on a case in which this Court recently denied *certiorari*, *EMC Mortgage Corp. v. Stark*, 125 S. Ct. 1973. Pet. 12-13. In *Stark*, the Court of Appeals for the Eighth Circuit had reviewed an arbitration award of punitive damages for excessiveness under the manifest disregard standard. 381 F.3d at 802-803. Such review for manifest disregard is consistent with the decisions of both the Connecticut Supreme Court in this

[3] Petitioner bases much of its argument on *dicta* from various opinions regarding *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186 (11th Cir. 1995), but "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (*quoting Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)).

case and the Alabama Supreme Court in *Horn*, as explained above.

The petitioner in *Stark* sought *certiorari* based on arguments similar to those advanced by Petitioner including, for example, that "if parties . . . cannot be assured of any semblance of due process review of massive punitive damage awards imposed by arbitrators, they have every incentive to avoid arbitration and resolve their disputes in court instead." Petition for Certiorari, *EMC Mortgage Corp. v. Stark* at 19 (No. 04-1056, Feb. 2, 2005), *cert. denied*, 125 S. Ct. 1973 (2005); *accord* Pet. 3. The petitioner in *Stark* also argued that "[t]he Eighth Circuit's manner of applying the standard for review of arbitral awards is wholly incapable of protecting against a punitive damages award that violates due process;" and contended that "[m]any cases go so far as to hold – erroneously – that there is no judicial scrutiny of arbitral awards of punitive damages at all, because no state action is supposedly involved, even though the arbitral award itself is meaningless absent state action in the form of a court order enforcing and compelling compliance with the award." EMC Petition at 23-24; *accord* Pet. 2, 9. Petitioner errs in claiming that *Stark* "did not squarely raise the state action question posed in this petition." Pet. 13, n. 7.

As demonstrated elsewhere in this brief, the above arguments are without merit. A review of arbitration punitive damages awards for excessiveness *is available* under established statutory standards. *See, supra*, at 7-11. Neither *Horn* nor the decision in this case prohibit the review, provided by many courts, of arbitration awards for excessiveness in manifest disregard of the law. *See, infra* at 15-16. Confirmation of an arbitration award pursuant to state statute does not transform the award into state action. *See infra* at 20-23. This petition is no more worthy of review than the petition in *Stark*.

Petitioner attempts to distinguish its case from *Stark* by arguing that the petitioner in *Stark* challenged the arbitration award itself, while here Petitioner claims to challenge not the arbitration award, but the judgment confirming it. Pet. 10. But Petitioner nowhere challenges how, or on what authority, the superior court confirmed the award; Petitioner does not challenge the judicial act itself. Rather, like the petitioner in *Stark*, Petitioner complains about *the amount* of the arbitration award, an amount decided not by the superior court but by three private arbitrators chosen by the parties pursuant to their arbitration agreement. Constitutional standards do not govern the arbitrators' award because such standards "are [properly] invoked only when it can be said that the State is responsible *for the specific conduct of which the plaintiff complains.*" *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis altered); *accord Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, 937 (1982) ("Our cases have insisted accordingly that the conduct allegedly causing the deprivation of a federal right be fairly attributed to the State.").

As shown above, courts, including those on which Petitioner relies to claim a conflict, are in agreement that the amount of an arbitration award of punitive damages is reviewable under established state and federal arbitration law standards. As shown below, courts have reviewed arbitration awards under those standards for manifest disregard of the principles established in *Gore*, and Petitioner had ample opportunity at numerous stages below to make its arguments based on those principles.

B. Reviewing Courts Have Applied *Gore* Principles To Arbitration Awards As A Matter Of Federal And State Arbitration Law

1. This Court has recognized the well established doctrine of arbitration law that courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing the decisions of lower courts." *United Paperworkers Int'l Union AFC-CIO v. Misco, Inc.*, 484 U.S. 29, 38-39 (1987). In particular,

"[w]here it is contemplated that the arbitrator will determine the remedies for . . . violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to interfere on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." *Id.* at 38. The grounds for judicial vacatur of a private arbitration award are much more limited than judicial review on appeal in litigation of a court case. "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision." *Id.* That is because, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

"'[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Id.* at 32, n. 4 (*quoting Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)). "[W]here a party has agreed to arbitrate, he or she . . . still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances," for example, where the award was "procured by corruption, fraud or undue means," or an "arbitrator exceeded his powers." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

Consistent with this well established body of arbitration law, the Connecticut Supreme Court recognizes that "[j]udicial review of arbitral decisions is narrowly confined." *Hartford Steam*, 868 A.2d at 51 (citations and internal quotations omitted). "When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of

the parties' agreement." *Id.* "When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission." *Id.* That said, "[e]ven in the case of an unrestricted submission," the state supreme court has recognized that "grounds for vacating an award" include that it "manifests an egregious or patently irrational application of the law" in violation of the arbitration statute. *Id.* at 52 (*citing* Conn. Gen. Stat. §52-418); *see* Pet. App. 89a.

Connecticut law follows federal law in defining the scope of manifest disregard review. The Connecticut Supreme Court has "adopted the test enunciated by the United States Court of Appeals for the Second Circuit in interpreting the federal equivalent of Connecticut General Statutes Section 52-418(a)(4)." *Hartford Steam*, 868 A.2d at 52 (citations and internal quotations omitted). Section 52-418(a)(4) mandates vacatur of an arbitration "award that manifests an egregious or patently irrational application of the law." *Id.* The test for manifest disregard requires that the error be obvious and easily perceived by an arbitrator; that the arbitration panel have ignored a clearly governing legal principle of which the panel appreciated the significance; and that the law that is alleged to have been ignored is "well defined, explicit and clearly applicable." *Hartford Steam*, 868 A.2d at 52; *accord Harty*, 2005 WL 1995354.

2. Among the well defined legal principles for which federal and state courts have reviewed arbitration awards under the manifest disregard standard are the principles for limiting excessive punitive damages awards established in *Gore*, 517 U.S. 559. The courts have not applied *Gore* as a matter of federal constitutional due process review. Rather, in keeping with state and federal law limiting judicial review of arbitration awards, they have applied *Gore* principles under the manifest disregard standard. *See, e.g., Horn*, 901 So. 2d at 51 (court's "clearly focused" review considered whether arbitrators manifestly disregarded *Gore* principles, and *not whether arbitrators*

"*misunderstood or misapplied those legal principles*") (emphasis added).

In sum, courts, including the Connecticut Supreme Court, the Alabama Supreme Court and numerous state and federal courts around the country, agree that punitive damages awards are reviewable for excessiveness under well established standards applicable to arbitration awards, but not as a matter of federal constitutional due process.

C. Petitioner Had Ample Notice And Opportunity Below To Argue The Principles Established In *Gore* Under The Governing Manifest Disregard Standard, But It Abandoned That Claim

1. The arbitration clause negotiated by these two businesses in 1998 did not restrict either party from seeking punitive damages; and Respondent explicitly sought punitive damages in its arbitration demand to the AAA. Petitioner does not dispute that the arbitration clause covered claims for punitive damages.

In its arbitration demand, Respondent alleged that Petitioner undertook a deliberate and wrongful course of conduct which constituted, among other things, unfair and deceptive behavior in violation of Connecticut's Unfair Trade Practices Act. MedValUSA Conn. S. Ct. App. A1-A20. The third count, captioned "CUTPA," specifically alleged that Respondent "suffered an ascertainable loss," which is a requirement for punitive damages under the statute. *Id.* at A19. Respondent explicitly sought punitive damages under CUTPA in its request for relief. *Id.* at A20.

Petitioner did not oppose arbitration; instead it voluntarily filed an answer, special defenses and a counterclaim in which it denied liability on each count, including under CUTPA. Answer and Counterclaim of Respondent, *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, AAA #12 193 00319 00 (Am. Arbitration Ass'n, October 21,

2000) (Petitioner's AAA Answer); Pet. App. 22a ("It is undisputed that the submission to arbitration was voluntary"). Petitioner's special defenses alleged, *inter alia*, that Respondent's "causes of action are barred in whole or in part by virtue of its failure to mitigate damages," and that "[a]ny damages suffered by [Respondent] were due in whole or in part to its own actions, inactions or negligence." Petitioner's AAA Answer, at 11. Petitioner did not allege that any contractual, statutory or constitutional right prohibited or limited Respondent's claim to punitive damages under CUTPA. *See id.*

During the lengthy arbitration proceedings, the parties were given and took full advantage of opportunities to present and challenge their respective claims. *See* Pet. App. 58a (describing extensive hearings that included oral argument, witnesses and post trial briefs). Respondent pressed its CUTPA claim, for which it explicitly sought punitive damages, in briefs and arguments to the arbitrators. MedValUSA Conn. S. Ct. App. A20-25, A33-35, A45, A49-51, A63-66. During the course of the arbitration, Petitioner acknowledged that the CUTPA claim sought attorneys' fees and punitive damages, *id.* at A59-62, A72, and did not argue that the punitive damages sought were limited, whether by the arbitration clause, the demand, Connecticut's arbitration statute, or state or federal constitutional law. Instead, Petitioner urged the arbitrators to reject Respondent's claim entirely. *E.g., id.*, at A26-32, A52-54, A67-71. At no point during this bargained for, consensual, lengthy arbitration did Petitioner use its ample opportunities to urge the arbitrators to reject or limit a punitive damages award. *Cf. Label Systems Corp. v. Aghamohammadi*, 852 A.2d 703 (Conn. 2004) (failure to argue *Gore* factors to trial judge who awarded punitive damages in a lawsuit filed under CUTPA precluded litigant from making appellate claim based on *Gore*).

2. When Petitioner moved to vacate the award in December, 2003, it cited a recent New York court of appeals decision vacating an arbitration award for CUTPA punitive damages on the ground that the award was

excessive in manifest disregard of *Gore*. *Sawtelle*, 754 N.Y.S.2d 264. Unlike Petitioner, the appellant in *Sawtelle* had argued the *Gore* principles to the arbitrators. *See id.* at 274 (arbitrators were advised of and failed to apply principles in *Gore*).

Despite Petitioner's failure to argue to the arbitrators in its case that they should apply the principles established in *Gore*, Petitioner claimed in superior court that the arbitrators entered their award in manifest disregard of those principles. Pet. App. 58a-59a, 74a, 76a. The superior court rejected the manifest disregard claim because, among other reasons, even if Petitioner were able to demonstrate a "clearly applicable legal principle limiting the amount of punitive damages that can be awarded in consensual arbitration," Petitioner had "no[t] demonstrated that the panel was made aware" of such a principle "or knowingly disregarded it." *Id.* Finally, the court held that the private arbitration award did not violate a purported state public policy based on Fourteenth Amendment protections against excessive punitive damages because federal constitutional due process review does not apply to decisions from a private, consensual arbitration. *Id.* at 66a ("the award is not subject to due process scrutiny").

After the superior court ruled against Petitioner for having failed to make a sufficient record on its state law claim of manifest disregard, Pet. App. 76a, Petitioner abandoned it. On appeal to the Connecticut Supreme Court, Petitioner preserved only its claim that the award violated a purported state public policy against excessive punitive damages. *Id.* at 2a. Petitioner also claimed, for the first time, that federal constitutional law mandates due process review of the award for excessiveness. *Id.*[4]

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[4] The Connecticut Supreme Court erred in accepting Petitioner's claim that Petitioner did not waive claims based on *BMW of North Am.*

(Continued on following page)

3. The full Connecticut Supreme Court, sitting en banc, agreed that the private, consensual arbitration award was not subject to review for excessiveness on federal constitutional due process grounds. *Id.* at 7a-22a, 36a. The court observed that review of excessive punitive damages awards is available under well established standards for reviewing arbitration decisions on the basis of arbitrators' partiality or manifest disregard of the law. *Id.* at 31a, n. 15. The court expressly declared, however, that Petitioner did "*not claim on appeal . . . that this award fits either of those criteria.*" *Id.* (emphasis added). It is clear that Petitioner abandoned its manifest disregard claim on appeal, perhaps because, as the superior court had observed, the argument lacked merit: Petitioner had not demonstrated that it had ever made its punitive damages argument to the arbitration panel. *Id.* at 76a.

II. The Connecticut Supreme Court Correctly Held That Judicial Confirmation Of The Amount Of Punitive Damages Awarded By Private Arbitrators In A Consensual Arbitration Does Not Render The Award Subject To Federal Constitutional Requirements

A. Confirmation Of A Private Arbitration Award Pursuant To State Statute Does Not Transform The Award Into An Act Of The State

1. Petitioner concedes that the award of punitive damages by the arbitrators is not an act of the state: "[p]rivate voluntary arbitration, without more, is not state action." Pet. 17. The State of Connecticut is not responsible for the conduct of privately chosen arbitrators who preside over privately funded alternative dispute

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v. Gore, 517 U.S. 559 (1996) when it failed to make those claims to the arbitrators. Pet. App. 7a, n. 7.

resolution proceedings, conducted pursuant to privately negotiated, contractually agreed upon rules. Petitioner nonetheless urges a finding of state action based on Connecticut's arbitration statute providing for confirmation of arbitration awards, a ruling which would apply to all "similar laws in other states." *Id.* at 21.

The Connecticut Supreme Court correctly rejected Petitioner's claim. Pet. App. 9a. The court cited this Court's "two part approach" for determining whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." *Lugar*, 457 U.S. at 937; Pet. App. 8a. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* The second part of this test, the court wrote, is answered by determining "'the extent to which the actor relied on government assistance and benefits . . . ; whether the actor is performing a traditional governmental function . . . ; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.'" Pet. App. 8a-9a (*quoting Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)). The Connecticut Supreme Court applied "these considerations," observing among other things that: the arbitration was privately funded; private arbitrators do not perform a traditional government function; and in confirming the award, the court did not act jointly with a private actor to deprive Petitioner of its property. *Id.* at 9a-22a. The court concluded "that the act of the Superior Court in confirming the arbitration award did not convert the arbitration award into state action." *Id.* at 9a.

Ignoring the two part *Lugar* analysis altogether, Petitioner argues that it is entitled to due process review because it challenges the superior court's confirmation of the arbitration award rather than the award itself. Pet.

20. But that is inaccurate. Petitioner challenges *the amount of the punitive damages*, an amount set by the arbitrators. *See, e.g., Misco*, 484 U.S. at 37-38 (where "parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept"). By agreeing to arbitrate their dispute, including any punitive damages, Petitioners gave up the right to have punitive damages decided by a court. *See id.*

Indeed, even if the superior court were convinced the amount of punitive damages awarded was based on erroneous findings of fact or law, the court would have had no authority to vacate the arbitration award or reduce the amount: "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision." *Id.* at 38. Under Connecticut's arbitration statute, and consistent with state and federal policy limiting judicial review of arbitration awards, the superior court had the authority only to determine whether the award violated one of the grounds listed in the arbitration statute, or ran afoul of a well established state public policy. Pet. App. 89a-90a; *Hartford Steam,* 868 A.2d at 52. The superior court did not have plenary authority to review the determinations of fact or law underlying the punitive damages award. *See id.*

The Connecticut Supreme Court correctly held that confirmation under Connecticut's arbitration statute did not transform the private arbitration award into state action. The superior court was not given and never had plenary authority to make the determinations underlying the amount of the punitive damages award; it never was responsible for setting the amount of punitive damages challenged by Petitioner. Constitutional standards "are [properly] invoked only when it can be said that the State

is responsible *for the specific conduct of which the plaintiff complains.*" *Blum*, 457 U.S. at 1004.

2. The cases relied upon by Petitioner to urge a finding of state action here do not address the arbitration issue presented. In *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 292 (1984), Pet. 20, this Court refused to give preclusive effect to an arbitration award in a federal civil rights action because "an arbitration proceeding cannot provide an adequate substitute for a judicial trial" on claims under 42 U.S.C. §1983. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Pet. 20, a court instructed a jury in a libel case to apply a state rule of defamation law that violated the First and Fourteenth Amendments. *Sullivan*, 376 U.S. at 265; U.S. Const. amend. 1, XIV §1. The conduct challenged there was an act of the state court, which directly exercised its authority to apply state tort law in a way that infringed the party's federal constitutional rights under the First and Fourteenth Amendments. *Shelley v. Kraemer*, 334 U.S. 1 (1948), on which Petitioner relied below, *see* Pet. App. 20a, and to which Petitioner refers in its petition, Pet. 8, involving enforcement of a discriminatory restrictive covenant, "has not been extended beyond race discrimination," *Loren v. Sasser*, 309 F.3d 1296, 1303 (11th Cir. 2002), *cert. denied*, 538 U.S. 1057 (2003), and has no apparent application to this case in which there is neither discrimination nor detrimental application of a contract to a non-signatory.

The test from *Lugar*, 457 U.S. 922, which was applied by the Connecticut Supreme Court, Pet. App. 8a, but is ignored by Petitioner, involved an *ex parte* writ of attachment sought by a private party, issued by a court, and executed by a county sheriff. *Lugar*, 457 U.S. at 923. This Court held that the "constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the State act jointly with a creditor in securing the property in dispute." *Id.* at 933 (*citing Sniadach and N. Georgia Finishing, Inc. v.*

De-Chem, Inc., 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); and *Fuentes v. Shevin*, 407 U.S. 67 (1972)); Pet. 21 (citing same cases). Petitioner does not claim there was, and indeed there was not, any such joint state and private action in this case.

3. As the Connecticut Supreme Court observed, courts addressing cases much like the one presented here have found no state action. Pet. App. 19a; *see Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1469 (N.D. Ill. 1997) (court enforcement of government mandated arbitration clause was not state action); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 708 F. Supp. 95, 96-97 (S.D.N.Y. 1989) (court approval of use of arbitration not state action). And a court addressing this very situation, (court confirmation of a punitive damages award under CUTPA), found no state action. *Sawtelle*, 754 N.Y.S.2d at 271 ("where the parties have voluntarily participated in the arbitration process, there is no state action involved, not even in the judicial confirmation of the punitive damage award"). Petitioner itself acknowledges that other federal and state courts have "refus[ed] to subject arbitral awards to due process review." Pet. 11 (citing cases).

Petitioner's attempt to dismiss those decisions because they "focus on the underlying arbitration and not judicial confirmation of the award," *id.*, is unpersuasive for the reasons already explained above. Indeed, to the extent that other courts have questioned whether court confirmation of an award is state action, *see* Pet. App. 19a-20a, Pet. 8, 13-24, they have done so in *dicta*, which does not present a basis for review by this Court. *California v. Rooney*, 483 U.S. 301, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (*quoting Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)).

4. In any event, Petitioner's claim to federal due process review is unconvincing because it fails to account for the differences between trials and arbitration proceedings. Petitioner would require a reviewing court to apply the principles in *Gore* not as a matter of review under

arbitration law, but in the same way that a reviewing court would scrutinize a punitive damages award on appeal in a civil lawsuit. This approach ignores that in commercial arbitration cases like this one, awards are not decided by a jury, or even by a judge randomly assigned to the matter, but by arbitrators selected by the parties themselves pursuant to contract. It ignores that parties are subject not to court rules and procedures imposed on them, but to rules they negotiate and agree to themselves. It ignores that parties to a commercial arbitration do not face the passion and prejudice of potentially biased juries, and that if arbitrators exhibit bias or prejudice, parties have recourse in the form of motions to vacate on those grounds. *See* Pet. App. 89a (*quoting* Conn. Gen. Stat. §52-418(a)(2)).

"[T]he point of due process – of the law in general – is to allow citizens to order their behavior." *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (*quoting Pacific Mut. Life Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)). That is exactly what consensual, contractual arbitration permits parties to do.

B. Petitioner's Theory Would Subject This And Other Private Arbitration Awards To Numerous Constitutional Challenges, Undermining A Central Purpose Of Federal And State Arbitration Law, To Allow Private Agreements To Avoid Protracted Litigation

Petitioner's claim that "[t]he question presented is . . . substantive and narrow," and "does not test whether arbitration procedures are subject to constitutional requirements," Pet. 18, is wrong. Petitioner asks this Court to rule on whether state court confirmation of an arbitration award, an every day occurrence in countless courts all around this country, constitutes state action under the Fourteenth Amendment. *Id.* at 19 (arguing that Connecticut Supreme Court erroneously held that

"entry of judgment on an arbitral award is not state action"). An answer in the affirmative would open this and every other private arbitration award not only to the due process challenge made by Petitioner, but to countless other legal challenges.

1. Under Petitioner's view of the case, Petitioner would be entitled to federal constitutional due process review of the amount of the arbitration award under *Gore* based on the state court's confirmation being state action. That review would open up countless related factual issues decided by the arbitrators including, as just one example, the question of the compensatory damages award. That is because review under *Gore* entails a comparison of punitive and compensatory damages. 517 U.S. at 524-25. In this case, the arbitrators failed to award any compensatory damages, notwithstanding the fact that their finding of liability necessarily entailed a determination that Respondent suffered an ascertainable loss. *See* discussion *supra* at 3. Respondent does not agree with the compensatory damages finding, but recognizes that judicial review of that error is not provided under state and federal arbitration law. That said, if Petitioner were allowed to revisit the amount of punitive damages, Respondent could not be precluded from challenging the denial of compensatory damages as erroneous, (as it could if the award were rendered by a judge or jury), because the one amount must, under a *Gore* analysis, be compared to the other. Particularly as the arbitrators explicitly found that Petitioner undertook a course of "unfair and deceptive" conduct for which it was liable for damages under CUTPA, MedValUSA Conn. S. Ct. App. A39, and in light of Petitioner's express reliance on the absence of compensatory damages for its challenge to the amount of the punitive damages award, Pet. 19, it would be patently unfair to allow Petitioner to revisit the punitive award without permitting Respondent to reopen the compensatory damages award.

Moreover, as the *Gore* analysis is fact specific, a reviewing court would have to consider all the evidence

presented in the private arbitration proceeding. This would require that henceforth transcripts be made, exhibits be filed and preserved, and written submissions be kept in any arbitration where punitive damages might be awarded (even when, as here, the *Gore* factors never were argued to the arbitrators.) Parties may of course *choose* to do all these things in arbitration, but they need not: "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer,* 500 U.S. at 31 (*quoting Mitsubishi,* 473 U.S. at 628). Mandating review under *Gore* would vitiate federal and state policies favoring the flexibility, informality and expedition of arbitration.

2. More broadly, there would be no basis for limiting the possible scope of federal constitutional due process challenges to the one substantive due process claim advanced by Petitioner. The Fourteenth Amendment's concepts of substantive and procedural due process "are not mutually exclusive, and their protections often overlap." *Albright v. Oliver,* 510 U.S. 266, 301 (1994) (Stevens, J., dissenting). This Court has "emphasized time and time again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *City of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998) (internal quotations and citations omitted). Petitioner's claim is neither only "substantive," nor "narrow." Pet. 18. As the Connecticut Supreme Court observed, a finding of state action here "would be applicable to other due process protections as well, including procedural due process, thus paving the way for constitutionalizing a wide variety of private conduct through public policy analysis. We decline to countenance this indirect imposition of

constitutional norms on private actors." Pet. App. 32a, n. 16.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

VERTRUE INCORPORATED
(f/k/a MemberWorks Incorporated),

Petitioner,

v.

MEDVALUSA HEALTH PROGRAMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. This Case Raises an Important Question on Which Courts Are Divided 1

II. The Decision Below Conflicts with This Court's Prior Precedents 7

TABLE OF AUTHORITIES

Page

CASES

BMW of North America, Inc. v. Gore, 513 U.S. 1125 (1995) 7

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Birmingham News Co. v. Horn, 901 So. 2d 27 (Ala. 2004) 4, 5, 6

Blum v. Yaretsky, 457 U.S. 991 (1982) 8

Boykin v. Alabama, 395 U.S. 238 (1969) 9

Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995) 5, 6

Dawahare v. Spencer, 210 F.3d 666 (6th Cir.), *cert. denied*, 531 U.S. 878 (2000) 9

Dorfman v. First Choice Construction Corp., 59 Conn. App. 81, 755 A.2d 924, *cert. denied*, 255 Conn. 901, 762 A.2d 908 (2000) 9

Estelle v. Gamble, 429 U.S. 97 (1976) 9

Garrity v. McCaskey, 223 Conn. 1, 612 A.2d 742 (1992) 2, 8

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) 9

Horn v. Maryland Casualty Co., 234 Conn. 408, 661 A.2d 1032 (1995) 2

Knepp v. Credit Acceptance Corp., 229 B.R. 821 (Bankr. N.D. Ala. 1999) 5

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 7

TABLE OF AUTHORITIES – Continued

Page

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 1

Saturn Construction Co., Inc. v. Premier Roofing Co., Inc., 238 Conn. 293, 680 A.2d 1274 (1996) 3

Sawtelle v. Waddell & Reed, Inc., 754 N.Y.S.2d 264 (N.Y. App. Div. 2003) 6

Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793 (8th Cir. 2004), *cert. denied sub nom Stark v. EMC Mortgage Corp.*, 125 S. Ct. 1943 (2005), *cert. denied sub nom EMC Mortgage Corp. v. Stark*, 125 S. Ct. 1973 (2005) 6, 7

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) 1, 4

Town of Groton v. United Steelworkers of America, 254 Conn. 35, 757 A.2d 501 (2000) 3

Von Langendorff v. Riordan, 147 Conn. 524, 163 A.2d 100 (1960) 4

STATUTES

9 U.S.C. § 10 6

CONN. GEN. STAT. § 52-418 ..... 4, 8

MISCELLANEOUS

Respondent's Brief in Opposition to Petition for Writ of Certiorari, *BMW of North America, Inc. v. Gore*, 1994 WL 16012022 (No. 94-896) 1, 7

R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice (8th ed. 2002) 1

I. This Case Raises an Important Question on Which Courts Are Divided.

This case presents a clear and important question: whether the due process protection against excessive punitive damages enunciated by this Court in *Gore* and *State Farm*[1] applies when a state court confirms an arbitral award of punitive damages. The punitive award confirmed by a state in this case – $5 million in punitive damages for an unfair trade practice, but not a cent in compensatory damages – is so extreme that neither Respondent nor the state court argue against its extremity. Moreover, the Connecticut Supreme Court rested its judgment on its holding that the judicial confirmation of an arbitral award of punitive damages does not constitute state action.[2] No case could more squarely and cleanly ask the question presented.

A. Respondent seeks to denigrate the significance of the clear question presented by asserting that there is no need for federal constitutional protection against the judicial confirmation of excessive punitive awards. No such protection is necessary, Respondent argues, because jurisdictions have knitted together a patchwork of local laws that theoretically offer some protection against

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[1] *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

[2] Respondent's argument that Petitioner did not preserve the due process argument for state appellate review is misplaced. *E.g.*, Br. Opp. 18 & n.4. The Connecticut Supreme Court discussed and decided the issue on federal constitutional grounds. App. at 7a-22a. It rejected the waiver argument. *Id.* at 7a n.7. Once a state court has decided a federal constitutional question, it is plain that "this Court has jurisdiction" to grant certiorari. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); R. Stern *et al.*, Supreme Court Practice 192 (8th ed. 2002) (same). Like Respondent here, the respondent in *Gore* wished it were otherwise. *See* Br. Opp., *Gore*, 1994 WL 16012022, at *4 ("[I]t is inexplicable why the Alabama Supreme Court addressed the issue. . . .").

excessive arbitral awards of punitive damages. The existence of these local laws, primarily "manifest disregard" review, is analytically irrelevant to whether substantive due process precludes state court confirmation of runaway arbitral awards of punitive damages. Just as important, both in concept and in practice, is the fact that local manifest disregard laws – like the state-law limits at issue in *Gore* itself – cannot and do not do the work of the Due Process Clause.

1. State law, including the law of manifest disregard, offers no real protection against judicial enforcement of shocking arbitral awards of punitive damages. In *Gore*, it was argued that Alabama law protected against excessive punitive damage awards. *Gore*, 517 U.S. at 589 (Breyer, J., concurring); *id.* at 610-611 (Ginsburg, J., dissenting). Had that been true, this Court's grant of certiorari might have been less imperative. But it was not true. Though the Alabama Supreme Court had adopted a multi-factor test intended to check excessive awards, *id.* at 589 (Breyer, J., concurring), and though the factors conceivably could have protected against excessive punitive awards, they did not do so in practice. "The upshot is that the rules that purport to channel discretion in this kind of case, here did not do so in fact." *Id.* at 595 (Breyer, J., concurring).

As in *Gore*, the local rule purportedly intended to "channel discretion" in this case – state manifest disregard review – does "not do so in fact." *Id.* In the thirteen years since they recognized the doctrine, Connecticut appellate courts have frequently considered manifest disregard challenges – but have *never* vacated an arbitral award on that basis. *See, e.g., Horn v. Maryland Cas. Co.*, 661 A.2d 1032 (Conn. 1995) (reversing manifest disregard-based vacatur of arbitral award); *Garrity v. McCaskey*, 612 A.2d 742 (Conn. 1992) (recognizing state law of manifest disregard but denying motion to vacate award). The Connecticut law of manifest disregard is a

doctrine in name only, used as a symbol to condemn disfavored conduct so egregious that it never occurs.[3] As in *Gore*, this toothless, state-law symbol of condemnation is too weak to substitute for due process.

2. In addition to its empirical ineffectiveness, "manifest disregard" review is conceptually incapable of protecting against the confirmation of excessive punitive damage awards. For a court to find manifest disregard, it must conclude that the arbitrator knew of a clear legal principle but chose to disregard it.[4] Therefore, state law must *already* preclude excessive punitive damages for "manifest disregard" review to provide any review at all. In the decision below, the Connecticut court held that Connecticut does *not* have a "well-defined and dominant public policy against the imposition of excessive punitive damages." App. at 31a, 33a; *see id.* at 32a (finding *Gore* does not support a state-law policy against confirming arbitral awards of "grossly excessive punitive damages"). Therefore, it is impossible for any arbitration panel to "appreciate[] the existence of a clearly governing legal principle" against excessive punitive damages, let alone "decide[] to ignore it." *Saturn Constr. Co.*, 680 A.2d at 1281; *see also* App. at 74a. By trumpeting manifest disregard review as a

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[3] By contrast, the Connecticut Supreme Court has used its "public policy" doctrine to vacate illegal arbitration awards on several occasions. *E.g.*, *Town of Groton v. United Steelworkers of Am.*, 757 A.2d 501 (Conn. 2000). Here, Petitioner urged the Connecticut Supreme Court to find a state public policy precluding the confirmation of excessive arbitral punitive damage awards, but the court found none. App. at 30a-34a.

[4] The Connecticut Supreme Court has described the inquiry as whether "(1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the arbitration panel appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit, and clearly applicable." *Saturn Constr. Co., Inc. v. Premier Roofing Co., Inc.*, 680 A.2d 1274, 1281 (Conn. 1996).

substitute for constitutional protection, Respondent asks this Court to imagine a regime in which arbitrators who ignore a legal principle rejected by the state supreme court are nonetheless somehow viewed as manifestly disregarding the law, rather than following it.

In sum, a state law authorizing manifest disregard review of arbitral decisions does not and cannot supply protection against runaway punitive damage awards.[5] Only by reviewing the applicability of *Gore* and *State Farm* to judicial confirmation of punitive damage awards can this Court determine whether litigants, by entering into arbitration, necessarily expose themselves to unlimited awards of punitive damages.

B. Respondent tries to obscure the clean presentation of this case by suggesting that the lower courts are in agreement that judicial confirmation of arbitral punitive damage awards does not constitute state action. As the Petition made plain, several courts flatly disagree with the Connecticut court's decision. Pet. at 8 (citing cases).

Respondent's efforts to shoehorn those cases into a single box is unsuccessful. In *Birmingham News Co. v. Horn*, 901 So. 2d 27 (Ala. 2004), the Alabama Supreme Court held that judicial confirmation of an arbitral award of punitive damages constitutes state action that subjects the confirmation of the award to due process scrutiny. As

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[5] The Connecticut Supreme Court also mentioned "evident partiality" as a possible grounds for refusing judicial confirmation of an arbitral award of excessive punitive damages. App. at 31a n.15 (citing Conn. Gen. Stat. § 52-418(a)(2)). Respondent wisely avoids attempting to support that passing mention, as Connecticut law does not allow a finding of "evident partiality" by inference from the substance of an arbitral award. *See Von Langendorff v. Riordan*, 163 A.2d 100 (Conn. 1960) (review of claim of partiality involves no inquiry into arbitrators' decision on merits). As with manifest disregard, the state law of evident partiality provides no backstop against arbitral awards of excessive punitive damages.

the Alabama court put it, "[t]hese appeals are appeals from the circuit [trial] court judgments of confirmation, not from the underlying awards. Accordingly, we readily perceive the requisite state action . . . ." 901 So. 2d at 66. The court thus distinguished itself from *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995), an Eleventh Circuit decision that Alabama was at pains to note "has been criticized by legal commentators, as discussed in *Knepp v. Credit Acceptance Corp.*, 229 B.R. 821 (Bankr. N.D. Ala. 1999)." *Horn*, 901 So. 2d at 66. Concurring in part, Justice Johnstone took issue with the *Horn* majority's finding of state action in the judicial confirmation of an arbitral award of punitive damages: "I question the holding in the main opinion that the punitive-damage awards in this case constitute State action subject to review for violation of the Due Process Clause of the United States Constitution." *Id.* at 75.[6]

Having found state action in judicial confirmation, the Alabama Supreme Court went on to determine how to conduct its review. In Petitioner's view, the court then erred, concluding that "court judgments of confirmation" should be analyzed through manifest disregard review, even though that standard is used to review the actions of the arbitrator rendering an award, not of a court confirming an award. Moreover, the court presumed that law binding only state actors would nonetheless be "clearly

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[6] *Horn* notes a factual distinction with *Davis*: in *Horn*, the trial court compelled arbitration, whereas in *Davis* the parties honored their arbitration contract without court compulsion. But that factual distinction bears no relation to *Horn*'s rationale for finding "the requisite state action underlying these appeals": they "are appeals from the circuit court judgments of confirmation, not from the underlying awards." 901 So. 2d at 66. It would make no sense to penalize parties that honor their voluntary decision to arbitrate (thus avoiding the need for a court order to compel arbitration) by withholding from them substantive due process protections.

applicable" law for the arbitrators (as opposed to the confirming court). *Id.* at 52, 69. But these analytical errors or gaps do not alter the court's finding of state action. If anything, the lack of analytical clarity in the application of state action principles to the judicial confirmation of arbitral awards of punitive damages only strengthens the argument for granting certiorari.

Unlike Respondent, the Connecticut court did not try to hide the clear split of authority between the Eleventh Circuit (*Davis*) and the Alabama Supreme Court (*Horn*). It acknowledged the conflict, listing four courts that support its conclusion, and then listing (via a negative "but see" signal) three courts that had come to the opposite conclusion – including the *Horn* court. App. at 19a-20a.

Respondent inaccurately claims that "[t]he Connecticut and Alabama decisions are consistent not only with each other, but also with" cases such as *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003), and *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004). Br. Opp. 9. These cases show that courts throughout the country are unable to find a doctrinally sound way to review outrageous punitive damages awards in the absence of due process protection. *Sawtelle* raised but avoided answering whether judicial confirmation of an arbitral award is state action, instead choosing to apply *Gore*'s limitations through a construction of the Federal Arbitration Act ("FAA") and vacating the award as excessive after considering *de novo* the application of *Gore* to the arbitral award. 754 N.Y.S.2d at 271-73 (citing 9 U.S.C. § 10). In *Stark*, the Eighth Circuit did not consider the state action question, instead asking whether the arbitrators had manifestly disregarded *Gore*, without asking whether *Gore* was "clearly applicable" law for non-state-actor arbitrators. 381 F.3d at 802-03. Taken together, *Stark* and *Sawtelle* exemplify the confusion in the courts.

They do not show the nationwide "consisten[cy]" for which Respondent cites them. Br. Opp. 9.[7]

II. The Decision Below Conflicts with This Court's Prior Precedents.

A. Like the Connecticut Supreme Court, Respondent starts with a mistaken premise. Petitioner does not claim that the arbitrators acted as state actors – or that judicial confirmation should be read "to impute state action to a private actor's conduct." App. at 20a. Petitioner claims that the state court confirmation of the award is *itself* state action.

Respondent presses the two-part test of *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), as the appropriate test for state action. Br. Opp. 20. The first part asks whether the deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state." *Lugar*, 457 U.S. at 937. The deprivation here – a court judgment activating the state's enforcement machinery – was unquestionably caused by a "privilege created by the state" (the privilege to seek state aid in enforcing a private arbitrator's order). The second part asks whether "the party charged with the deprivation" is "a person who may fairly be said to be a state actor." *Id.* Here, the state court judge who entered the judgment may "fairly be said to be a state actor." Under *Lugar*, the confirmation of an arbitral award constitutes state action. And it is "the specific conduct of

[7] Respondent suggests that certiorari should not be granted because a petition in *Stark* raised similar issues. Br. Opp. 12. Even if that were true (and it is not, *see* Pet. 13 n.7), the presence of earlier petitions raising similar issues does not itself counsel against granting certiorari. *Compare* Br. Opp., *Gore*, 1994 WL 16012022, at *1 ("This petition raises nothing new") *with BMW of North Am., Inc. v. Gore*, 513 U.S. 1125 (1995) (order granting certiorari, notwithstanding).

which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), *quoted in* Br. Opp. 22.

This result should not be surprising. The confirmation of an arbitral award is far from a ministerial act. Pet. 21-22. Through both common law and statute, Connecticut empowers its judges to vacate arbitral awards that the State deems to conflict with state policy. *See Garrity v. McCaskey*, 612 A.2d 742, 745-46 (Conn. 1992); Conn. Gen. Stat. § 52-418. Consistency with state priorities is thus a substantive hurdle that an arbitral award must clear in order to earn the coercive power of the State. Without the State's policy-based seal of approval, arbitral awards cannot be confirmed. This process is of course more than some minor ministry: it is government differentiation, sorting the blessed from the cursed. But while Connecticut applies its own substantive policies to determine which arbitral awards it will enforce, it now refuses to apply the substantive policies embedded in the federal Constitution.

B. In a last-ditch effort to dissuade this Court from considering the important and unsettled issue presented in the Petition, Respondent conjures up three ill effects that it imagines would flow from a finding of state action. Br. Opp. 25-27. All are phantom ills.

First, Respondent asserts that due process scrutiny of arbitral punitive damage awards would require similar review of arbitral compensatory damage awards, since one of the *Gore* guideposts requires comparing the two. Petitioner is aware of no case scrutinizing a jury or bench award of punitive damages under *Gore* that also scrutinized compensatory damages as part of that same task. Respondent offers no citation and no explanation for how the floodgates would open.

Second, Respondent alleges that arbitration would be hindered by constitutional review of arbitral punitive damages for excessiveness because review would require